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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-614

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

James H. Baumgartner, Jr.
Akin, Vial, Hamilton, Koch & Tubb
1500 Republic National Bank Tower
Dallas, Texas 75201

Of Counsel:
Paul D. Schoonover
Akin, Vial, Hamilton, Koch & Tubb
1500 Republic National Bank Tower
Dallas, Texas 75201

INDEX

	Page
Opinions Below	1
Contest to Jurisdiction	1
Constitutional and Statutory Provisions Involved	5
Statement of the Case	9
Argument	13
1. This case involves no important question of federal law	13
2. The decision below is clearly correct	14
Conclusion	25
Certificate of Service	25
APPENDIX	
Judgment of the 162nd Judicial District Court of Dallas County, Texas	27

CITATIONS

Cases

Adam v. Saenger, 303 U.S. 59 (1938)	20
Bailey v. Anderson, 326 U.S. 203, 206-07 (1945)	4
Brunson v. Brunson, 372 S.W.2d 761, 764 (Tex. Civ. App.—Amarillo 1963, no writ)	22
California Dep't of Mental Hygiene v. Bank of Southwest Nat'l Ass'n, 163 Tex. 314, 354 S.W.2d 576, 581 (1961)	22

Page

Chapman v. Tyler Bank & Trust Co., 396 S.W. 2d 143 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) 21

Chicago, I. & L.R.R. v. McGuire, 196 U.S. 128, 131-33 (1905) 4

Country Clubs, Inc. v. Ward, 461 S.W.2d 651, 655 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) 20

Crouch v. McGaw, 134 Tex. 633, 138 S.W. 2d 94 (1940) 19

Ellis v. Dixon, 349 U.S. 458, 463 (1955) 2, 4

Gard v. Gard, 244 S.W. 2d 884 (Tex. Civ. App.—El Paso 1951, no writ) 20

Garman v. Reynolds, 284 S.W.2d 262 (Tex. Civ. App.—Fort Worth 1955, writ ref'd) 20

Gorman v. Washington Univ., 316 U.S. 98 (1942) 4

Harris v. Windsor, 156 Tex. 324, 294 S.W.2d 798, 799 (1956) 23

Henry v. Mississippi, 379 U.S. 443 (1965) 2, 4

Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959) 14, 18

Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934) 4

Midessa Television Co. v. Motion Pictures for Television, 290 F.2d 203 (5th Cir.), *cert. denied*, 368 U.S. 827 (1961) 19

Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 636 (1875) 1

	Page
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928)	2
Overmyer Co. v. Frick Co., 405 U.S. 174 (1972)	14
Osmond v. Spence, 405 U.S. 971 (1972), *vacating and remanding* 327 F. Supp. 1349 (D. Del. 1971)	14
Paschall v. Geib, 405 S.W.2d 385 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.)	20
Ryan v. City Nat'l Bank & Trust Co., 186 S.W.2d 747, 748 (Tex. Civ. App.—Eastland 1945, no writ)	20
Saulpaugh v. Born, 22 Ohio App. 275, 154 N.E. 166 (1925)	19
Scott Paper Co. v. Johnson, 406 S.W.2d 548, 549 (Tex. Civ. App.—Waco 1966, no writ)	21
State v. Scott, 460 S.W.2d 103 (Tex. 1970), *cert. denied*, 402 U.S. 1012 (1971)	2
Stembridge v. Georgia, 343 U.S. 541 (1952)	4
Street v. New York, 394 U.S. 576, 581-85 (1969)	2, 4
Trice Prod. Co. v. Dutton Drilling Co., 333 S.W.2d 607, 616 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.)	22
United States v. Throckmorton, 98 U.S. 61 (1878)	19
Wallace v. Scrogum, 372 S.W.2d 941 (Tex. 1963)	23

Treatise

R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 116-31 (4th ed. 1969)	2

Page

Constitutional and Statutory Provisions

OHIO REV. CODE ANN. § 2323.13 (1954) 3, 6, 13
OHIO REV. CODE ANN. § 2325.01 (1954) 6, 10, 14, 18, 19
OHIO REV. CODE ANN. § 2325.10 (1954) 7, 10, 14, 18, 19
TEX. R. CIV. P. 94..... 2, 8, 21
TEX. R. CIV. P. 374..... 8
TEX. R. CIV. P. 469(c)..... 3, 9, 23
28 U.S.C. § 1257(3) (1970)..... 1, 2
28 U.S.C. § 1738 (1970)..... 5, 10, 18
U.S. CONST. art. IV, § 1..... 5, 12, 18

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BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, UNION COMMERCE BANK, respectfully files this its Brief in Opposition to the Petition for Writ of Certiorari, and prays that said petition be denied because, as shall hereinafter be shown, there exists neither reason nor jurisdiction to grant said writ.

OPINIONS BELOW

While Petitioner is correct in stating that the trial court, the 162nd Judicial District Court of Dallas County, Texas, did not write an opinion; nevertheless, that court did recite important findings of fact and conclusions of law in its judgment. Accordingly, the trial court's judgment is printed in the Appendix to this brief in opposition. The opinion of the Texas Court of Civil Appeals at Beaumont is printed in Appendix A to the petition.

CONTEST TO JURISDICTION

Although at first blush it may appear that this Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(3) (1970), limitations upon the grant of judicial power of Article III of the United States Constitution recognized by this Court dictate that the petition be dismissed for lack of jurisdiction because: (1) the decision of the Supreme Court of Texas in denying the application for writ of error was based on adequate nonfederal bases; and/or (2) the federal question was never properly raised in the Supreme Court of Texas.

This Court has consistently declined to review state court judgments based upon adequate nonfederal grounds. *See, e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875).

When the nonfederal, or state, ground is based on a rule of procedure rather than substantive law, the rule must serve a legitimate state interest. *See Henry v. Mississippi*, 379 U.S. 443 (1965). Also, this Court requires that the federal question actually be raised in the state court preceedings in order to justify jurisdiction under 28 U.S.C. § 1257(3) (1970). *See Street v. New York*, 394 U.S. 576, 581-85 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *R. Stern & E. Gressman, Supreme Court Practice* 116-31 (4th ed. 1969). These two jurisdictional limitations dovetail when the nonfederal ground is a state rule of procedure, which in turn has prevented the petitioner from urging or obtaining a ruling on his constitutional arguments. In such a situation this Court has stated that "it is not entirely clear whether . . . the scope of our review is limited to determining whether the state court has 'bypassed the federal right under forms of local procedure or whether we should decide the matter '*de novo* for ourselves.'" *Ellis v. Dixon*, 349 U.S. 458, 463 (1955).

Under either or both of the above standards it is clear that this Court has no jurisdiction to review this case. Petitioner never raised a constitutional defense of any kind at the trial of this cause (Tr. 3-6).[1] Texas Rule of Civil Procedure 94 requires that such a defense be affiirmatively pled in an answer at trial. *See State v. Scott*, 460 S.W.2d 103 (Tex. 1970), *cert. denied*, 402 U.S. 1012 (1971) (constitutional defense is an affirmative defense). Petitioner did not assert a constitutional basis for his motion for a directed verdict, nor did he present a constitutional objection to Respondent's motion for directed verdict

[1] "Tr." citations are to the Transcript of Record in the trial court, which constituted part of the record in the Texas Court of Civil Appeals at Beaumont, and is Document 1 of the certified record in this cause.

(which was granted). Petitioner, on appeal to the Texas Court of Civil Appeals at Beaumont, for the first time raised a constitutional defense to the trial court's judgment. Petitioner there alleged that the Ohio confession of judgment statute, Ohio Revised Code § 2323.13 (1954) (amended 1970), was per se violative of the fourteenth amendment to the United States Constitution because it provided no opportunity to be heard prior to judgment.[2] Respondent at that time noted that the court of civil appeals was precluded from dealing with the issue because of Petitioner's failure to plead or otherwise present such a defense at trial.[3] The Texas Court of Civil Appeals refused to entertain Petitioner's constitutional argument, as is evidenced by the absence of any reference to such argument in that court's opinion or its overruling of Petitioner's motion for rehearing.

In Petitioner's application to the Texas Supreme Court for a writ of error, Petitioner, for the first time, raised the argument that he did not knowingly and intelligently waive his rights to notice under the fourteenth amendment.[4] Because this alleged error was not included in Petitioner's points of error on appeal in the Texas Court of Civil Appeals at Beaumont, Respondent noted in its contest to the application for a writ of error[5] that consideration of the argument by the Texas Supreme Court was precluded by Texas Rule of Civil Procedure 469 (c). Like the court of civil appeals, the Texas Supreme Court refused

[2] Brief of Appellant, point of error 4; Document 5 in the certified record of this cause.

[3] Brief of Appellee at 12-13; Document 6 in the certified record of this cause.

[4] Application for Writ of Error, point of error 1; Document 11 in the certified record of this cause.

[5] Contest to Application for Writ of Error at 9-11; Document 12 of the certified record in this cause.

to consider this or any other improperly raised defensive issue of Petitioner, as is evidenced by its refusal to grant the writ of error and its overruling of Petitioner's motion for rehearing.

Clearly the cited Texas rules of civil procedure requiring the timely raising of affirmative defenses at trial and/or points of error on appeal serve a legitimate state interest in avoiding prejudice to parties, delay, and waste of judicial resources. Therefore, under the standard of *Henry v. Mississippi*, 379 U.S. 443 (1965), any refusal of the Texas courts to consider Petitioner's allegations of constitutional error would be based upon an adequate state ground, thus precluding this Court from taking jurisdiction of this case.

Petitioner has the burden of showing affirmatively that this Court has jurisdiction. *Gorman v. Washington Univ.*, 316 U.S. 98 (1942). When, as here, the highest state court has failed to pass upon a federal question, it has been held that "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 580, 582 (1969). *See Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Chicago, I & L.L.R.R. v. McGuire*, 196 U.S. 128, 131-33 (1905). Further, at best Petitioner can argue only that the reason for the Texas Supreme Court's refusal to grant his writ of error is unclear. In such a situation Petitioner is deemed not to have sustained his burden of establishing this Court's jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). Similarly, in *Ellis v. Dixon*, 349 U.S. 548 (1955), this Court declined jurisdiction of a petition for writ of certiorari to a New York intermediate appellate court, when it

determined the New York Court of Appeals "might" have denied leave to appeal on the basis of a nonfederal ground (insufficiency of pleading).

Therefore, under whatever standard applicable, it is obvious that Petitioner has not and cannot affirmatively demonstrate that this Court has jurisdiction of this case. Any decision that this Court might render on Petitioner's waiver questions would simply be an advisory opinion, because on remand Texas courts would still be free to insist upon compliance with the requirements of the Texas Rules of Civil Procedure with respect to timely presentation of affirmative defenses, and affirm the trial court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Full Faith and Credit Clause of the United States Constition and its implementation provision with respect to judicial proceedings are set forth below:

> SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[5]
>
> § 1738. State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts

[5] U. S. CONST. art. IV, § 1.

within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[7]

2. The Ohio cognovit judgment statute, as it existed on the date Respondent obtained its Ohio judgment, is set forth below:

Section 2323.13 (11597) Warrant of attorney to confess

An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the Court before which he makes the confession, which shall be in the county where the maker resides or in the county where the maker or any one of several makers sign the warrant of attorney authorizing the confession of judgment, any agreement to the contrary notwithstanding; and the original or copy of the warrant shall be filed with the clerk.[8]

3. The Ohio statutes setting forth the grounds and procedures by which judgments might be set aside, as they existed at all times pertinent hereto, are as follows:

§ 2325.01 Final order, judgment, or decree of court of common pleas or court of appeals may be vacated or modified. (GC § 11631)

The court of common pleas or the court of appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made:

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[7] 28 U.S.C. § 1738 (1970).

[8] Ohio Rev. Code Ann. § 2323.13 (1954) (amended 1970).

(A) By granting a new trial of the cause, within the time and in the manner provided in sections 2321.19 [2321.21) of the Revised Code;

(B) By a new trial granted in proceedings against defendants constructively summoned as provided in section 2703.18 of the Revised Code;

(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;

(D) For fraud practiced by the successful party in obtaining a judgment or order;

(E) For erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(F) For the death of one of the parties before the judgment in the action;

(G) For unavoidable casualty or misfortune, preventing the party from prosecuting or defending;

(H) For errors in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in section 2323.21 of the Revised Code;

(I) For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment;

(J) When such judgment or order was obtained in whole or in a material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted.[9]

§ 2325.10 Limitation on such relief. (GC § 11640)

Proceedings to vacate or modify a judgment or order for the causes mentioned in divisions (D), (E), and (G) of section 2325.01 of the Revised Code must be commenced within two years after the judgment was rendered, or order made. Proceedings for the causes mentioned in divsions (C) and (F) of such section,

[9] *Id.* § 2325.01.

must be commenced within three years, and in division (I) of such section, within two years after the defendant has notice of the judgment. Under division (J) of such section, the proceedings may be commenced after the guilty party is convicted, if the conviction is within two years from the rendition of the judgment.[10]

4. The following Texas Rules of Civil Procedure require that defenses and points of appeal be properly raised and preserved.

Rule 94. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

Rule 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in

[10] *Id.* § 2325.10.

cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary.

Rule 469. Requisites of Application [for writ of error] . . . .

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

STATEMENT OF THE CASE

Petitioner's statement of the case contains few record references and fails to set forth the true nature of the case; consequently, Respondent presents its own statement.

Respondent brought suit against Petitioner in the 162nd Judicial District Court of Dallas County, Texas, on a foreign judgment obtained by Respondent against Petitioner in Cuyahoga County, Ohio, on November 30, 1967, in the total sum of $17,899.23, with interest at the rate of eight (8%) percent per annum from the date of the entry of said judgment (Tr.

7-16; S.F. Plf. Exh. 2).[11] Although Petitioner and his counsel received actual notification that judgment had been taken against him within forty-five (45) days after its rendition (S.F. 13; Df. Exh. 1), Petitioner, while represented by counsel (S.F. 14; Df. Exh. 1), made no attempt to cause said judgment to be vacated in Ohio pursuant to Ohio Revised Code sections 2325.01(I) and 2325.10.[12]

In support of its suit on the foreign judgment, on August 7, 1970, Respondent filed a motion, pursuant to Texas Rule of Civil Procedure 184a, requesting the District Court to take judicial notice of the common law, public statutes, and court decisions of the State of Ohio as such existed on the date of the judgment (Supp. Tr. 4-6),[13] which notice the District Court did take (Tr. 17-19). Petitioner proceeded to trial on the merits of this cause based upon the allegations contained in his First Amended Answer, which alleges no constitutional defense whatsoever (Tr. 3-6).

At the trial Respondent introduced and had accepted without objection an exemplified copy of the foreign judgment obtained in Cuyahoga County, Ohio, (S.F. 15-16; Plf. Exh. 2) which complied in all respects with the requirements of 28 U.S.C. § 1738 (1970) (State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit). Under the substantive

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[11] "S.F." citations are to the Statement of Facts of proceedings before the trial court, which constituted part of the record in the Texas Court of Civil Appeals at Beaumont, and is Document 4 of the certified record in this cause. "Plf. Exh." or "Df. Exh." citations are to the exhibits used at trial, which are appended to the Statement of Facts described above.

[12] OHIO REV. CODE ANN. §§ 2325.01(I), 2325.10 (1954).

[13] "Supp. Tr." citations are to the Supplemental Transcript of Record, which constituted part of the record in the Texas Court of Civil Appeals at Beaumont, and is Document 2 of the certified record in this cause.

law of the State of Texas and the United States of America, absent affirmative proof that the rendering court had no jurisdiction, or that the judgment was fraudulently obtained, the exemplified copy of the foreign judgment as admitted in evidence was entitled to full faith and credit.

Petitioner tendered no evidence to controvert or attack the validity of the foreign judgment as entered under the laws of the State of Ohio, and Petitioner made no attempt whatsoever to tender any evidence that Petitioner did not understand the terms and conditions of the cognovit note, which he executed on January 13, 1965, in Cleveland, Cuyahoga County, Ohio (S.F. 1-76; Plf. Exh. 1). Rather, Petitioner attempted to affirmatively demonstrate that the Ohio judgment was obtained by "extrinsic" fraud and, therefore, not entitled to full faith and credit.

The trial was before a jury. At the conclusion of all testimony and evidence in chief, and after Respondent and Petitioner had rested and closed, upon a motion made by Respondent's attorney, the cause was withdrawn from the jury and judgment entered for the Respondent in the total sum of $22,837.93, plus interest at the rate of eight (8%) percent per annum from the date of the judgment until paid (S.F. 83-85; Tr. 17-19). From the directed verdict granted by the trial court, Petitioner prosecuted an appeal to the Texas Court of Civil Appeals at Beaumont.

As previously stated, Petitioner pled an affirmative defense at the trial of this cause that the Ohio court had no in personam jurisdiction over the Petitioner. However, Petitioner failed to introduce any evidence whatsoever to the effect that under the laws of the State of Ohio the Ohio court did not have in personam

jurisdiction over the Petitioner. Instead, Petitioner defended during the trial of this cause on the sole basis that the foreign judgment obtained in Ohio was obtained by "extrinsic" fraud (Tr. 3-6; S.F. 1-76, 78-83). Petitioner at no time pled or attempted to introduce a trial amendment to his pleadings alleging a constitutional defense during the trial of this cause; Petitioner did not raise a constitutional issue regarding his fourteenth amendment rights during the trial of this cause; and in Petitioner's motion for a directed verdict, which was overruled, Petitioner set forth no constitutional basis for the assertion of said motion (Tr. 3-6; S.F. 1-76; S.F. 78-83).

However, before the Texas Court of Civil Appeals at Beaumont Petitioner attempted to assert for the first time that the use of a cognovit note per se violated his fourteenth amendment right to due process.[14] The Texas Court of Civil Appeals at Beaumont determined that the law of the State of Ohio did provide for judgment upon a cognovit note, citing Ohio statutes and case authority. The court noted that the Petitioner failed to cite any authority to the contrary; and pursuant to a long line of substantive authority in the State of Texas determined that even though Texas did not permit a judgment to be obtained upon a cognovit note, a judgment upon a cognovit note obtained in a foreign state recognizing such procedure will be given full faith and credit in the State of Texas under Article IV, Section 1 of the Constitution of the United States. The court further found that as a matter of law the fraud as alleged by Petitioner was intrinsic in nature, and not extrinsic fraud which is necessary to constitute a defense to any action upon a judgment under the

[14] Brief of Appellant, point of error 4; Document 5 in the certified record of this cause.

substantative law of the State of Texas and of the United States. The Texas Court of Civil Appeals then affirmed the judgment of the trial court.

After filing a motion for rehearing in the Court of Civil Appeals at Beaumont, which was ultimately overruled,[15] Petitioner then continued his appeal by filing an application for writ of error addressed to the Supreme Court of Texas, and again he attempted to allege a new point of error.[16] Without opinion the Texas Supreme Court refused Petitioner's application for writ of error with the notation "no reversible error," and after Petitioner's motion for rehearing on his application for writ of error to the Texas Supreme Court was denied, Petitioner perfected his application for writ of certiorari which is presently before this Court.

ARGUMENT

1. This case involves no important question of Federal Law.

The first question allegedly presented by this case is:

> Whether an Ohio judgment on a cognovit note obtained in accordance with Ohio Revised Code, Section 2323.13 as it existed on November 30, 1967, is constitutionally invalid under the due process clause of the Fourteenth Amendment because Petitioner was deprived of both notice and an opportunity to be heard prior to judgment, and an opportunity to defend the action on the note on the merits subsequent to judgment.[17]

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[15] Motion for Rehearing of Appellant, point of error 4; Document 9 in the certified record of this cause.

[16] Application for Writ of Error, point of error 1; Document 11 in the certified record of this cause.

[17] Petition for Writ of Certiorari, Shaps v. Union Commerce Bank, No. 72-614, at 2.

This precise question has already been decided in the negative by this Court in *Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Osmond v. Spence*, 405 U.S. 971 (1972), vacating *and remanding* 327 F. Supp. 1349 (D. Del. 1971). Even though it may be doubtful state policy to allow one an opportunity to defend on the merits subsequent to a judgment, Ohio has done just that; and Petitioner has no one to blame but himself for his failure to avail himself of such a generous procedure. Pursuant to Ohio Revised Code sections 2325.01(I), 2325.10[10] and applicable case law, Petitioner could have caused the Ohio judgment to be vacated (within two years from notice of entry) upon any allegation of a jury question on the merits or otherwise. *See Livingstone v. Rebman*, 169 Ohio St. 109, 158 N.E.2d 366 (1959).

In light of the foregoing, Respondent respectfully submits that to the extent that Petitioner's first question refers to a deprivation of "both notice and opportunity to be heard prior to judgment," *Overmyer* has already disposed of the constitutional issue. With respect to that portion of Petitioner's first question referring to the additional deprivation of "an opportunity to defend the action on the note on the merits subsequent to judgment," such an opportunity did exist under the above-cited Ohio law, and Petitioner, represented by counsel (S.F. 14; Df. Exh. 1), did not take advantage of it.

2. The Decision Below is Clearly Correct.

Respondent respectfully submits that Petitioner must be deemed as a matter of law, under any applicable standard,

[10] Ohio Rev. Code Ann. §§ 2325.01(I), 2325.10 (1954). *See* pp. 6-8 *supra*.

to have waived his rights to issuance of citation, service of process, or an opportunity to be heard prior to judgment at one, all, or any combination of the following occasions: (a) at the time Petitioner executed the cognovit note in question; (b) after notification of the entry of judgment, when Petitioner failed to exercise his right to cause said judgment to be vacated under applicable Ohio law; (c) at the trial of this cause; and (d) on appeal of this case.

(a) *At the Time Petitioner Executed the Cognovit Note in Question:* Petitioner testified that he obtained a Masters of Business Administration degree from Harvard Business School in 1950 (S.F. 45), and that at the time Petitioner executed the cognovit note in question he was the Administrative Vice President of The Charles Corporation responsible for *all* the financial aspects of The Charles Corporation (S.F. 7, 6). Petitioner further testified that as the Administrative Vice President in charge of all the financial aspects of The Charles Corporation, Petitioner was privy to several meetings between the President of The Charles Corporation and one of Respondent's officers, wherein the financial status of The Charles Corporation was discussed (S.F. 23-24).

In attempting to support the allegations contained in his pleadings that the Ohio judgment was obtained by fraud (Tr. 3-6), Petitioner testified in essence that pursuant to a financial scheme and plan, various officers and employees of The Charles Corporation, including the Petitioner herein, would borrow money from Respondent upon the execution of a cognovit note guaranteed by The Charles Corporation; the officers and employees would purchase common stock of The Charles Corporation; the officers and employees would then pledge the shares

of common stock purchased from The Charles Corporation to Respondent as collateral for their notes held by Respondent; and The Charles Corporation would take the monies received from the sale of the stock to its officers and employees and pay off debts of The Charles Corporation owed to Respondent (S.F. 19, 23-26, 30). Additionally, Petitioner testified that at the time he executed the cognovit note in question, he personally was aware of the distinction and the effect of the distinction between a corporate signature and a personal signature (S.F. 46).

Petitioner further testified that when he left the employ of The Charles Corporation, he entered into an indemnity agreement with The Charles Corporation under which he assigned all his right, title, and interest in the shares of The Charles Corporation owned by him and held by Respondent as collateral for the indebtedness evidenced by the cognovit note in question, in consideration of The Charles Corporation's agreement to indemnify Petitioner against liability upon the cognovit note that Respondent ultimately sued upon and obtained judgment in Ohio (S.F. 33-35, 48; Df. Exh. 5). However, Petitioner readily acknowledged he did not enter into any agreement with Respondent with regard to his liability on the cognovit note executed by Petitioner and payable to Respondent (S.F. 49-50).

Respondent respectfully submits that based upon Petitioner's own testimony during the trial of this cause, Petitioner clearly, and unequivocally demonstrated not only the existence of an outstanding educational background, but also his adeptness in making use of promissory notes to effectuate a most sophisticated transaction. In addition to his obvious business stature, Petitioner most definitely established that at the time he resigned

from The Charles Corporation in July 1965, he was acutely aware of his personal liability on the cognovit note in question, and as a consequence entered into an agreement with The Charles Corporation whereby The Charles Corporation was to indemnify Petitioner against any liability upon the cognovit note. Based upon the foregoing, Respondent submits that given Petitioner's educational background, his business knowledge and responsibilities, and his familiarity with the transaction surrounding the execution of the cognovit note in question, under any applicable standard, Petitioner by the execution of the cognovit note waived his fourteenth amendment right to receive issuance of citation, service of process, and an opportunity to be heard prior to entry of the judgment upon the cognovit note.

Petitioner received consideration of $20,000.00 for his execution of the cognovit note in question, and he was an active party and participant in the alleged corporate scheme to restructure the debt-equity position of his employer, The Charles Corporation. There is no evidence or any testimony whatsoever that Petitioner was in any manner coerced or otherwise pressured to execute the cognovit note in question. To the contrary, Petitioner wanted to "help" his employer, and had the stock appreciated in value, Petitioner would have received the benefit of that appreciation (S.F. 51).

(*b*) *After Notification of the Entry of Judgment, When Petitioner Failed to Exercise his Right to Cause said Judgment to be Vacated under Applicable Ohio Law*: Respondent obtained judgment against Petitioner pursuant to the cognovit provisions of the promissory note on November 30, 1967, and within forty-five days of the rendition of said judgment Petitioner and his

counsel received actual notice that judgment had been taken against him (S.F. 13; Df. Exh. 1). Even though Petitioner was entitled under Ohio law [19] to cause said judgment to be vacated within two years from notice of entry of the judgment, upon the mere showing of a jury question, Petitioner did nothing. *See Livingstone v. Rebman*, 169 Ohio St. 109, 158 N.E. 2d 366 (1959). The Texas action for enforcement of the Ohio judgment was initiated May 6, 1969, and from such date Petitioner still had in excess of eight months to avail himself of the procedures of Ohio law pertaining to the setting aside of cognovit judgments.

Thus, by his failure to actively assert the rights afforded him under Ohio law at the time of the trial of this cause on April 27, 1971, (Tr. 17-19) Petitioner had placed himself in an untenable position. Under Article IV, Section 1 of the United States Constitution,[20] and the federal statute effectuating the full faith and credit requirements set forth in the Constitution,[21] Petitioner could successfully defend the suit on the foreign judgment only by affirmatively proving the rendering court had no jurisdiction, or by affirmatively demonstrating that the foreign judgment was obtained by fraud.[22] In essence, the knowledgeable failure of Petitioner while represented by counsel (S.F. 14; Df. Exh. 1) to exhaust the remedies available in Ohio to vacate the foreign judgment, precluded Petitioner from asserting a defense before the Texas courts predicated upon the premise that Petitioner did not "knowingly and/or intelligently"

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[19] OHIO REV. CODE ANN. §§ 2325.01(I), 2325.10 (1954). *See* pp. 6-8 *supra*.

[20] U.S. CONST. art. IV, § 1. *See* p. 5 *supra*.

[21] U.S.C. § 1738 (1970). *See pp.* 5-6 *supra*.

[22] This is by operation of certain legal presumptions which are accorded foreign judgments under full faith and credit. These principles are fully discussed in subparagraph "b" at pp. 19-20 *supra*.

waive his constitutional right to issuance of citation, service of process, and an opportunity to be heard prior to rendition of the judgment against him.

Respondent respectfully submits that based upon the foregoing, as of the trial date of this cause, Petitioner could not as a matter of law assert any defense which went to the merits of the cause upon which Respondent obtained judgment in Ohio on November 30, 1967. Under the law of the State of Ohio, Petitioner's allegations of "fraud" in connection with Respondent's obtaining judgment have long since been held to be of an intrinsic nature and not sufficient to provide Petitioner with a defense in the State of Ohio under the provisions of the Ohio Revised Code sections 2325.01(D), and 2325.10.[23] *Saulpaugh v. Born*, 22 Ohio App. 275 154 N.E. 166 (1925). In addition, under the law of the State of Texas the "fraud" as alleged by Petitioner, if fraud at all, as a matter of law would constitute intrinsic fraud, and as such is insufficient to provide a defense to an action upon any judgment. *Crouch v. McGaw*, 134 Tex. 633, 138 S.W.2d 94 (1940); *accord*, *United States v. Throckmorton*, 98 U.S. 61 (1878); *Midessa Television Co. v. Motion Pictures for Television*, 290 F.2d 203 (5th Cir.), *cert. denied*, 368 U.S. 827 (1961).

(c) *At the Trial of this Cause*: At the trial Respondent introduced, and had accepted without objection, an exemplified copy of the Ohio judgment, upon which it brought suit in the State of Texas (S.F. 15-16; Plf. Exh. 2), that complied in all respects with the requirements of 28 U.S.C. § 1728 (1970).[24]

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[23] Ohio Rev. Code Ann. §§ 2325.01(D), 2325.10 (1954). *See* pp. 6-8 *supra*.

[24] *See* pp. 5-6 *supra*.

The courts of the State of Texas and of the United States of America have consistently held that upon a plaintiff's introduction of a properly authenticated copy of a foreign judgment being sued upon, a prima facie case for enforcement of such judgment is created. *Garman v. Reynolds*, 248 S.W.2d 262 (Tex. Civ. App. — Fort Worth 1955, writ ref'd), and the cases cited therein. Further, the introduction into evidence of such a properly exemplified copy of a foreign judgment does, as a matter of law, raise the following legal presumptions:

i. The jurisdiction of the rendering court will be presumed, and all prior requisites to the rendition of a valid judgment will be presumed to have been fulfilled, unless disproved by extrinsic evidence, or by the record itself. *Adam v. Saenger*, 303 U.S. 59 (1938); *accord, Paschall v. Geib*, 405 S.W.2d 385 (Tex. Civ. App. — Dallas 1966, writ ref'd. n.r.e.);

ii. A foreign judgment is presumed to be in full force and unsatisfied until proof to the contrary is made by the Defendant. *Gard v. Gard*, 144 S.W.2d 884 (Tex. Civ. App. — El Paso 1951, no writ); *accord, Ryan v. City Nat'l Bank & Trust Co.*, 186 S.W.2d 747, 748 (Tex. Civ. App. — Eastland 1945, no writ), and the cases cited therein; and

iii. A foreign judgment is presumed to be entitled to full faith and credit under the laws of the State of Texas. *Country Clubs, Inc. v. Ward*, 461 S.W. 2d 651, 655 (Tex. Civ. App. — Dallas 1970, writ ref'd. n.r.e.); *accord, Paschall v. Geib*, 405 S.W. 2d 385, 386 (Tex. Civ. App. — Dallas, 1966 writ ref'd n.r.e.). Further, Texas Courts have consistently held that:

> Texas does not permit judgment obtained by 'confes-fession of judgment.' Nevertheless, a judgment by confession obtained upon a judgment note in a foreign

> state, recognizing such procedure, will be given full faith and credit in Texas under Article IV, Sec. 1 of the United States Constitution. . . .

Scott Paper Co. v. Johnson, 406 S.W. 2d 548, 549 (Tex. Civ. App. — Waco 1966, no writ).

Given the nature of the allegations contained in Petitioner's First Amended Original Petition (Tr. 7-16), and the foregoing clearly delineated legal presumptions, under the provisions of rule 94 of the Texas Rules of Civil Procedure it was mandatory that Petitioner herein plead every affirmative defense available to him at the trial of this cause. Under Texas law the failure to plead an affirmative defense as required by rule 94 effectuates, as a matter of law, a waiver of such defense. *Chapman v. Tyler Bank & Trust Co.* 396 S.W. 2d 143 (Tex. Civ. App. — Tyler 1965, writ ref'd n.r.e.). However, at no time during the trial of this cause did Petitioner plead a possible constitutional defense or the absence of his knowledgeable waiver of issuance of citation, service of process, and an opportunity to be heard prior to rendition of judgment in Ohio (Tr. 3-6), which waiver was specifically pled by Respondent (Tr. 7-16). Petitioner made no attempt to assert a constitutional defense or the absence of a knowledgeable waiver of issuance of service of process upon execution of the cognovit note at any time during the trial of this cause (S.F. 1-76). Further, Petitioner did not attempt to assert any similar defense in his motion for directed verdict (S.F. 79-83), which was overruled by the trial court. (S.F. 83). Respondent respectfully submits that if Petitioner did not as a matter of law waive any constitutional defense by his execution of the cognovit note as discussed in subparagraph "a" above, or if Petitioner did not as a matter of law preclude the assertion

of any such constitutional defense by his failure to exhaust the remedies available to him in Ohio within two years after notice of the Ohio judgment — when at all times material Petitioner was represented by counsel (S.F. 14; Df. Exh. 1) — as discussed in subparagraph "b" above; Petitioner *did* as a matter of law waive any such defenses by his failure to affirmatively plead or offer evidence in support of the defenses before, at, or during trial of this cause.

(*d*) *On Appeal of this Case*: Petitioner on appeal of this cause to the Texas Court of Civil Appeals at Beaumont for the first time asserted an affirmative defense to the effect that the foreign judgment, having been obtained by a confession of judgment, was in violation of Petitioner's fourteenth amendment rights and, therefore, not entitled to full faith and credit.[25] Before the Texas Court of Civil Apeals at Beaumont, Respondent urged that absent affirmative pleading or the introduction of evidence in support of the alleged violation of Petitioner's constitutional rights under the fourteenth amendment, the issue of the constitutionality of a judgment taken in a foreign jurisdiction upon a cognovit note was not properly before the court of civil appeals.[26] *See California Dep't. of Mental Hygiene v. Bank of Southwest Nat'l Ass'n*, 163 Tex. 314, 354 S.W.2d 576, 581 (1961); *accord*, *Brunson v. Brunson*, 372 S.W.2d 761, 764 (Tex. Civ. App. — Amarillo 1963, no writ); *Trice Prod. Co. v. Dutton Drilling Co.*, 333 S.W.2d 607, 616 (Tex. Civ. App. — Houston 1960, writ ref'd n.r.e.). The Texas Court of Civil

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[25] Brief of Appellant, point of error 4; Document 5 in the certified record of this cause.

[26] Brief of Appellee at 12 1. Document 6 in the certified record of this cause.

Appeals at Beaumont refused to entertain Petitioner's constitutional argument, as is evidenced by the absence of any reference to such alleged error in that court's opinion or its overruling of Petitioner's motion for rehearing.

In Petitioner's application to the Texas Supreme Court for writ of error, Petitioner, for the first time, raised as alleged error, the claim that he did not knowingly and intelligently waive his rights to notice under the fourteenth amendment. However, as previously presented in subparagraph "c" above, the question of Petitioner's unknowing, or nonintelligent, waiver was not presented during the trial of this cause, was not raised on appeal before the court of civil appeals, was not presented in Petitioner's motion for rehearing before the court of civil appeals,[27] and as a direct consequence thereof, pursuant to rule 469(c) of the Texas Rules of Civil Procedure, such question could not properly be considered by the Texas Supreme Court. *Wallace v. Scrogum*, 372 S.W.2d 941 (Tex. 1963); *accord*, *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798, 799 (1956), wherein the Court held:

> The point was not raised in the Trial Court, in Petitioner's Brief as Appellant in the Court of Civil Appeals, or in his Motion for Rehearing in that court. It is presented for the first time in this Court, and cannot, therefore, be considered.

Thus, Respondent respectfully submits that Petitioner's affirmative defense of a nonintelligent or unknowing waiver of his fourteenth amendment right of due process was never properly before either the Texas Court of Civil Appeals at Beaumont or

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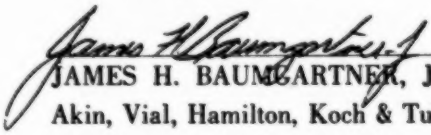
[27] Appellant's Motion for Rehearing, Point of Error 4; Document 9 of the certified record in this cause.

the Texas Supreme Court, for the reason that Petitioner waived the assertion of such a defense during the trial of this cause. Based upon the foregoing authorities, Petitioner cannot and should not now be heard to complain of his own lack of due diligence and his failure to consistently and continuously afford himself the benefit of, and adhere to, the substantive and procedural laws of both the State of Ohio and the State of Texas. Specifically, Petitioner did not attempt to cause the Ohio judgment to be vacated, though an adequate remedy was available under Ohio law, and Petitioner did not attempt to assert his alleged affirmative defenses in a proper manner before the Texas courts.

CONCLUSION

For the foregoing reasons Respondent respectfully submits that the petition for a writ of certiorari be denied.

Respectfully submitted,



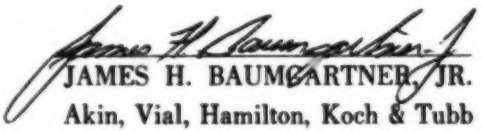
JAMES H. BAUMGARTNER, JR.
Akin, Vial, Hamilton, Koch & Tubb
1500 Republic National Bank Tower
Dallas, Texas 75201

Of Counsel:

PAUL D. SCHOONOVER
Akin, Vial, Hamilton, Koch & Tubb
1500 Republic National Bank Tower
Dallas, Texas 75201

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1972, three copies of this Brief for Respondent in Opposition were mailed, first class postage prepaid, to Harold B. Berman, 2650 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, Attorney for Petitioner.



JAMES H. BAUMGARTNER, JR.
Akin, Vial, Hamilton, Koch & Tubb
1500 Republic National Bank Tower
Dallas, Texas 75201

APPENDIX

NO. 69-3805-I

UNION COMMERCE BANK VS. D. W. SHAPS	IN THE 162nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 27th day of April, 1971, came on to be heard the above numbered and entitled cause wherein UNION COMMERCE BANK OF CLEVELAND, OHIO, is Plaintiff, and D. W. SHAPS is Defendent, and came the Plaintiff by and through its attorney of record, and came the Defendent in person and by and through his attorney of record, and announced ready for trial, and thereupon came a jury of twelve (12) good and lawful men and women, and the jury having been fully impaneled and sworn, said cause was tried before the Court and jury. At the conclusion of all testimony and evidence in chief, and after Plaintiff and Defendent had rested and closed, came the Plaintiff by and through its attorney of record and moved the Court to withdraw the cause from the jury, and for the Court to render a verdict in favor of the Plaintiff.

The Court, after hearing Plaintiff's Motion for a directed verdict, and after hearing the arguments of counsel for both Plaintiff and Defendent, was of the poinion that Plaintiff was entitled to Judgment as a matter of law, and found as follows:

1. That, it was uncontroverted that on January 13, 1965, Defendent borrowed the sum of $20,000.00 from Plaintiff, and that in connection with said transaction, Defendent executed a certain promissory note evidencing said indebtedness payable on demand in Cleveland, Cuyahoga County, Ohio, and that Defendent purchased stock in the Charles Corporation with said borrowed funds;

2. That Defendent defaulted on the payment of said note, and on November 30, 1967, Plaintiff obtained judgment against Defendent in Cause No. 853,166, during the September term, 1967, of the Court of Common Pleas of Cuyahoga County, Ohio, in the total sum of $17,899.23 plus interest at the rate of eight (8%) percent per annum until paid;

3. That the aforesaid judgment obtained in Cuyahoga County, Ohio, was regular on its face in all respects, and was obtained in its entirety pursuant to the laws of the State of Ohio as they existed on November 30, 1967; and

4. That as such, said judgment, absent sufficient evidence to create a question of fact with regard to the jurisdiction of the Court in Ohio being obtained by fraud, of which there was none, said judgment is entitled to full faith and credit in the State of Texas under Article 4, Sec. 1, of the Constitution of the United States of America.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff herein, UNION COMMERCE BANK OF CLEVELAND, OHIO, do have judgment against, and recover of and from Defendent, D. W. SHAPS, the total sum of $23,299.47, said sum being comprised of the amount of the judgment entered in Cleveland, Cuyahoga County, Ohio, on November 30, 1967, being $17,899.23 plus interest at the rate

of 8% per annum from the date hereof to date of judgment herein; that said Plaintiff further is entitled to recover of and from said Defendent interest on this judgment at the rate of eight (8%) percent per annum until fully paid, plus all costs of Court, for all of which let execution issue.

To which Judgment the Defendent duly excepted and gave notice of appeal.

SIGNED AND ENTERED this 14th day of May, 1971.

s/Dee Brown Walker

Judge, 162nd District Court
Dallas County, Texas

APPROVED AS TO FORM:

AKIN, VIAL, HAMILTON, KOCH & TUBB
1500 Republic National Bank Tower
Dallas, Texas 75201 748-4541

By s/James H. Baumgartner
James H. Baumgartner, Jr.
Attorneys for Plaintiff

BERMAN, FICHTNER & MITCHELL
1516 LTV Tower
Dallas, Texas 75201

By.....
Harold B. Berman
Attorneys for Defendant